

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FLATWORLD INTERACTIVES,

No. C -12-01956 JSW (EDL)

Plaintiff,

**ORDER REGARDING IN CAMERA
REVIEW**

v.

APPLE INC.,

Defendant.

On December 2, 2013, the Court issued an Order giving the parties leave to lodge a total of seventeen documents for in camera review in connection with Defendant's First Motion to Compel. The parties lodged the documents on December 4, 2013. The Court has reviewed the parties' submissions and orders as follows.

JMPPriv137A/MLB_F0000045: Plaintiff has asserted the attorney-client privilege and the spousal privilege for this document. Communications that would have been made for a business purpose are not protected by the attorney-client privilege. See McCaugherty v. Sifferman, 132 F.R.D. 234, 238 (N.D. Cal. 1990) ("No privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice. Fisher et al. v. United States et al., 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1975)."). This email chain constitutes a business communication and therefore, is not protected by the attorney-client privilege.

However, the spousal privilege "protects from disclosure private communications between spouses." United States v. Griffin, 440 F.3d 1138, 1143-44 (9th Cir.2006). The privilege exists "to protect the integrity of marriages and ensure that spouses freely communicate with one another."

1 Griffin, 440 F.3d at 1143. The Ninth Circuit has held that “[t]he privilege (1) extends to words and
2 acts intended to be a communication; (2) requires a valid marriage; and (3) applies only to
3 confidential communications, i.e., those not made in the presence of, or likely to be overheard by,
4 third parties.” United States v. Montgomery, 384 F.3d 1050, 1056 (9th Cir. 2004) (citing United
5 States v. Marashi, 913 F.2d 724, 729–30 (9th Cir.1990)). Further, the Ninth Circuit construes the
6 spousal privilege narrowly, to promote marriage without thwarting the administration of justice. Id.;
7 Marashi, 913 F.2d at 730.

8 Here, Defendant argued that there was no expectation of privacy in communications sent or
9 received through Mr. McAleese’s law firm email account, and so the communications were not
10 protected by the spousal privilege. In determining whether an employee’s communications
11 transmitted or stored on a work computer are privileged, courts typically consider four factors as set
12 forth in In re Asia Global, 322 B.R. 247, 257 (Bankr.S.D.N.Y.2005): (1) does the company maintain
13 a policy banning personal or other objectionable use, (2) does the company monitor the use of the
14 employee's computer or email, (3) do third parties have a right of access to the computer or emails,
15 and (4) did the corporation notify the employee, or was the employee aware, of the policy. Asia
16 Global, 322 B.R. at 257. The factors in this case weigh in favor of the application of the spousal
17 privilege. Most significantly, even if there is a policy banning personal use of the firm email system
18 and the firm had the right to access Mr. McAleese’s email, there has been no showing under the
19 second factor that the firm actually monitored the email system in general or Mr. McAleese’s email
20 in particular. See In re High Tech Employee Antitrust Litig., 2013 WL 772668, *7 (N.D. Cal. Feb.
21 28, 2013). Further, a law firm’s email system is regularly used to communicate confidential
22 attorney-client and work product information, so the expectation of privacy among its attorney users
23 is reasonable absent a particular showing to the contrary. Therefore, the document is protected by
24 the spousal privilege.

25 **JMPPriv141:** Plaintiff has asserted the attorney-client privilege and the spousal privilege for this
26 document. Although the email chain is most likely a business communication that is not protected
27 by the attorney-client privilege, it is protected by the spousal privilege as described above.

28 **PRIV0293:** Plaintiff has asserted the attorney-client privilege and the spousal privilege for this

1 document. Although the email chain is most likely a business communication that is not protected
2 by the attorney-client privilege, it is protected by the spousal privilege.

3 **PRIV0426:** Plaintiff has asserted the attorney-client privilege and the spousal privilege for this
4 document. Although the email chain is most likely a business communication that is not protected
5 by the attorney-client privilege, it is protected by the spousal privilege.

6 **MLB_F0000280:** Plaintiff has asserted the attorney-client privilege and the spousal privilege for
7 this document. Although the email chain is most likely a business communication that is not
8 protected by the attorney-client privilege, it is protected by the spousal privilege.

9 **JMPPriv036:** This email is protected by the spousal privilege.

10 **PRIV1037:** Plaintiff asserted the attorney-client privilege for this document. Because the email is a
11 business communication rather than a legal communication, it is not protected by the attorney-client
12 privilege.

13 **PRIV0851:** Plaintiff asserted the attorney-client privilege for this document. Because the email is a
14 business communication rather than a legal communication, it is not protected by the attorney-client
15 privilege.

16 **PRIV1110:** Plaintiff asserted the attorney-client privilege for this document. Although there
17 appears to be a business purpose for this document, it also contains legal advice and is protected by
18 the attorney-client privilege.

19 **PRIV0857/PRIV1035:** Plaintiff asserted the attorney-client privilege for this document. This
20 document contains legal advice, and is protected by the attorney-client privilege.

21 **MLB_F000024:** This document is a business communication that is not protected by the attorney-
22 client privilege, but for the reasons stated above, it is protected by the spousal privilege.

23 **MLB_F0000146:** This email chain is protected by the spousal privilege.

24 **JMPPriv1039:** This document is protected by the attorney-client privilege.

25 **PRIV 1093:** This document is protected by the attorney-client privilege.

26 **PRIV1290:** This document is protected by the attorney-client privilege.

27 A question remains as to the scope of any subject matter waiver resulting from Plaintiff's
28 disclosure of privileged documents. Under the Federal Rules, waiver "extends to an undisclosed

1 communication or information in a federal or state proceeding only if: (1) the waiver is intentional;
2 (2) the disclosed and undisclosed communications or information concern the same subject matter;
3 and (3) they ought in fairness to be considered together.” Fed. R. Evid. 502(A).

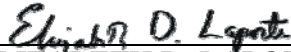
4 The Court concludes that the subject matter waiver extends to topics that were the subject of
5 disclosed communications but no further. For example, Plaintiff produced a document regarding its
6 valuation of the patent-in-suit. Blake Decl. Ex. 22. While Defendant argued that in producing
7 exhibit 22, Plaintiff has waived the attorney-client privilege as to all communications regarding the
8 valuation of the patent-in-suit, Plaintiff argued that no waiver occurred, and even if there was
9 waiver, it was limited to exhibit 22 itself. The subject matter waiver in this example extends to
10 communications between Plaintiff and its attorneys regarding the value of the patent-in-suit without
11 reissue prior to the March 8, 2010 date of Ms. McAleese’s email contained in Exhibit 22.

12 In another example, Plaintiff’s patent prosecution attorney, Mr. Nelson, sent an email to
13 Plaintiff’s co-founders regarding the outcome of Plaintiff’s reissue application. Blake Decl. Ex. 21.
14 Ms. McAleese forwarded that email to a representative of a patent monetization company, Ocean
15 Tomo ICAP. Plaintiff disclosed Mr. Nelson’s email and produced exhibit 21. Thus, Plaintiff has
16 waived the attorney-client privilege with respect to communications between Plaintiff and Mr.
17 Nelson regarding the outcome of Plaintiff’s reissue application.

18 In addition, Plaintiff produced communications between Mr. McAleese and Ms. McAleese
19 regarding Plaintiff’s attempts to license or sell the patent-in-suit to Nokia. Blake Decl. Ex. 17, 18,
20 20. Thus, Plaintiff has waived the spousal privilege as to communications between Mr. McAleese
21 and Ms. McAleese regarding Plaintiff’s attempts to license or sell the patent-in-suit to Nokia.

22 **IT IS SO ORDERED.**

23 Dated: January 8, 2014

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25 ELIZABETH D. LAPORTE
26 United States Magistrate Judge
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